The next question which requires to be considered is whether the depositions may be treated as evidence because the Attorney for the prisoner suggested that they might be so treated. The fact that the suggestion came from the prisoner's solicitor warrants the presumption that the prisoner was not prejudiced by their adoption. It is provided by s. 537 that no sentence passed by a Court of competent jurisdiction shall be reversed or altered on account of any irregularity in any inquiry under this Code, unless such irregularity has occasioned a failure of justice. It has been held in cases in which evidence which is legally inadmissible has been received at the trial without objection, that the opposite party is not entitled to ask for a new trial on the ground that the Judge did not warn the Jury to place no reliance upon it. In the case before us the prisoner's Attorney suggested the course that has been taken. I also think, therefore, that the appeal may be proceeded with, and that the irregularity in the procedure followed at the trial may be treated as one by which the prisoner has not been prejudiced.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

GAJAPATHI (PLAINTIFF), APPELLANT,

and

ALAGIA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1885. August 5, 12.

Vendor and purchaser—Fraudulent concealment by vendor of defect of title—Damages.

In 1881 a Hindú executed a sale-deed of a house in the Mufassal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Múnsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree.

On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks.

Held, that if there had been fraudulent concealment as alleged, the purchaser was entitled to damages.

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimhayyar, District Múnsif of Tiruvellúr, in suit 709 of 1882.

* Second Appeal 243 of 1885.

GAJAPATHI v. ALAGIA.

Mr. *Michell* and *Ambrose* for appellant.

Bháshyam Ayyangár and *Srirangácháryár* for respondents.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Hutchins and Parker, JJ.)

JUDGMENT.—The appellant (Gajapathi Sástri) purchased a house from the respondent No. 1 (Alagia Pillai) for Rupees 1,500 on the 16th September 1881. On the 26th December following he was ejected from half the house under a decree for partition, which had been obtained some eight years previously by a coparcener of respondent No. 1 against the father of respondent No. 1. The appellant alleges that at the time of his purchase the respondent No. 1 assured him that the house was his self-acquired property, and the title-deeds delivered to him by the respondent No. 1 (B and C) were conveyances in favor of respondent No. 1. The appellant's contention was that he was deceived by the fraudulent concealment by respondent No. 1 of the decree for partition, and is entitled to damages.

The pleas of respondent No. 1, so far as they are material, were—(1) that the appellant had notice of the decree, and received a copy of it along with the title-deeds; (2) that the house is in fact his self-acquisition.

Respondents Nos. 2 and 3 are the undivided brothers of No. 1 and deny their liability. The District Munsif found that the respondent No. 1 had been guilty of fraudulently concealing the existence of the decree for partition, and awarded the appellant 750 rupees as damages with proportionate costs. As regards respondents Nos. 2 and 3 he found that they had taken the benefit of the purchase-money, and that their property was liable, but not their persons.

The respondents appealed to the District Court, which held that the vendor was not bound in law to have mentioned the existence of the decree, and that the vendee, having omitted to insist on a covenant for title, must be taken to have accepted all risks.

The Múnsif's decree rests on the following propositions, which, since the sale, have been enacted in the Transfer of Property Act, section 55:—(1) The seller is bound to disclose to the buyer any material defect in the property, of which the seller is and the buyer is not, aware, and which the buyer could not with ordinary

care discover; and the omission to make such disclosure is fraudulent; (2) the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same. It is contended for the appellant that these are no new principles enacted for the first time, but that the Transfer of Property Act has merely declared the law which already existed. On the other hand, the respondents assert that, although the appellant might have been entitled to set up the alleged concealment against a suit for specific performance, yet as the conveyance has been executed and there has been no covenant for title, the appellant is not entitled to any refund of the purchase-money.

It appears to us that, if the respondent No. 1 did conceal from the appellant the existence of the decree for partition, he was guilty of a fraudulent concealment, and is bound to refund half the purchase-money. In the absence of positive law, we are bound in this country to apply the principles of good conscience and equity. The strict doctrines of the English law relating to real property have never been applied to the mufassal, and it appears to us that it would be manifestly inequitable to attempt to apply them; but even under English law the vendee is bound to make compensation for a fraudulent concealment of a defect in the title or of an incumbrance. The same rules apply to incumbrances and defects in the title to an estate as to defects in the estate itself (Sugden, Vendors and Purchasers, p. 5, ed. xiii). Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to which his covenants do not extend, an exception is made to this rule in the case of a vendor or his agent suppressing an incumbrance or a defect in the title (*ibid.*). Even though the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title-deeds and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case, or file his bill in equity for relief (*ibid.* p. 443).

The District Judge considered it "probable that the vendor, having continued always in undisturbed possession, entirely overlooked or disregarded the existence of the decree." This, however, is contrary to the case of respondent No. 1, for he said in his

GAJAPATHI v. ALAGIA.

written statement that, so far from overlooking or disregarding the decree, he had before sale given a copy thereof with the title-deeds to the appellant's next friend. We observe, too, that the appellant was ousted by the respondent's coparcener within about three months after his purchase.

On being dispossessed, the appellant should have given his vendor notice of the proceedings. Although the respondent No. 1 has admitted that he has all along been aware of the decree for partition, and yet has never set up that the house was his self-acquisition, he may still be able to prove that he had in fact the interest which he assumed to transfer. There has been no direct issue upon this point, and notwithstanding his admissions, we think that the respondent No. 1 is entitled to show that the alleged defect in his title did not exist.

We will ask the Judge to return findings, within six weeks from the receipt of this order, on the following issues :—

1. Did the respondent No. 1 fraudulently conceal from the appellant the existence of the decree for partition?
2. Is the house the self-acquisition of respondent No. 1?
3. To what damages, if any, is the appellant entitled, and against which of the respondents?

Further evidence may be adduced by either side on the second issue only.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. September 25.

BRAHANNÁYAKI (REPRESENTATIVE OF MUTTU, DEFENDANT No. 2), and KRISHNA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Lis pendens.

N being mortgagee in possession of five-eighths of a pangu (share) of certain and—security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878 K bought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N claiming possession of his two-eighths on payment of Rs. 400 and obtained a decree and possession thereof.

Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883,

* Second Appeal 30 of 1885.